(2)

No. 00-428

Supreme Court, U.S
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DEBRA CIRAOLO,

Petitioner,

-against-

CITY OF NEW YORK POLICE DEPARTMENT OF THE CITY OF NEW YORK, CHRISTIN MORGILLO, DETECTIVE SHIELD NO. 2233, JANE DOES 1-2, SHIELD NOS. UNKNOWN, and JULIE FONTANELLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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October 9, 2000

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COUNTER QUESTION PRESENTED

In a §1983 action, is petitioner, who was stripped search after an arrest pursuant to a policy of the Department of Corrections of the City of New York in violation of the Fourth Amendment of the United States Constitution, entitled to punitive damages under the authority of *City of New Port v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)?

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COUNTER-STATEMENT OF THE CASE

Respondents respectfully request that this Court deny the petition by petitioner, Debra Ciraolo, for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered

June 15, 2000 (App. 1-34). The opinion is reported at 216 F.3rd 236 (2d Cir. 2000).

The Second Circuit reversed the judgment of the U.S. District Court for the Southern District of New York (Patterson, J.) insofar as it awarded plaintiff $5,000,000 in punitive damages for an unlawful strip search of her person. The Circuit court remanded the case to the District Court for further proceedings.

This Court should deny review. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court held that municipalities are immune from punitive damages under § 1983 except in cases "where taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights." Id. at p. 267 n.29.

In reaching its conclusion, this Court using a two–part approach carefully considering, first, the extent of municipal immunity at common law and the legislative history relevant to §1983 and, second, the policies behind punitive damages and their compatibility with the purpose of § 1983. With regard to the first part, this Court found that municipal immunity was well established at common law, that there was no legislative history to suggest that it was Congress' intent to abolish that immunity under § 1983. With regard to the two major policy arguments for punitive damages—deterrence and retribution—this Court found that neither policy justified punitive damages against a municipality.

In her petition, petition has failed to raise any argument that undermines the legal integrity of this Court's holding in *City of Newport*. In addition, petitioner has

failed to cite any conflicts on this issue among the Circuitsand as between the Circuit Courts and this Court.

STATEMENT OF FACTS

The Complaint

In her complaint, plaintiff, Debra Ciraolo, stated that she brought her action pursuant to 42 U.S.C. § 1983 to redress deprivation of her constitutional rights. She alleged that on January 21, 1997, members of the New York City Police department arrested her without probable cause, used excessive force during the effectuation of her arrest, and then subsequent to her arrest, subjected her to an unjustified strip and body cavity search.

The Trial

The Verdict on Counts Other than Punitive Damages

(1)

The trial began on or about May 3, 1999 and concluded on May 6, 1999 (A7).[1] Prior to charging the jury, the District Court asked counsel for the parties whether punitive damages could be charged against the City of New York.

In a letter, dated May 5, 1999, from Stephen H. Weinder, counsel for plaintiff, stated that "having reviewed *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), I

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[1] Numbers in parentheses refer to the page numbers of the Joint Appendix in the Circuit.

am satisfied that punitive damages are not available against the City of New York on the Monell claim (Fourth Cause of Action) . . ." (A10).

In a letter, dated May 6, 1999, the attorney for the City directed the District Court's attention to the case of *Falk v. The County of Suffolk*, 781 F. Supp. 146, 151 (E.D.N.Y. 1991), *citing, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 251 (1981) for the proposition that punitive damages could not be awarded against the City (A12).

On May 6, 1999, at the completion of the trial testimony, the District Court charged the jury.

The District Court stated, in part, that plaintiff contended that she had been deprived of her constitutional rights by 1) Detective Morgillo's unlawful arrest; 2) Detective Morgillo's excessive force during that arrest; and 3) her strip search by two correction officers subsequent to her arrest (A39). The District Court then instructed the jury regarding reasonable cause to believe a person committed a crime, the existence of probable cause, the elements of the underlying crime (aggravated harassment) for which the plaintiff was arrested (A39-40).

The District Court instructed the jury as to whether Detective Morgillo was entitled to use force under the circumstances of her arrest of plaintiff and how much force she could use (A42-43).

The District Court explained to the jury that if they found that the defendants had violated plaintiff's rights and those violations were the proximate cause of damages to

her, then they had to determine the correct amount that would compensate plaintiff (A47-48). The Court told the jury about compensation for pain and suffering and mental anguish (A49).

(2)

The District Court then addressed the issue of punitive damages. The Court stated that "[p]unitive damages are awarded, in the discretion of the jury, to punish the defendant for extreme or outrageous conduct or to deter or prevent a defendant and others like him from committing such conduct in the future" (A50). The Court stated that the jury could award punitive damages "if you find that the acts or omissions of the defendant were done maliciously or wantonly" (A50). The Court explained that plaintiff had the burden of proof of proving by a preponderance of the evidence that the defendant acted maliciously or wantonly. An intent to injure exists, the Court stated, "when the defendant has a conscious desire to violate federal rights of which he is aware, or when the defendant has a conscious desire to injure plaintiff in a manner he knows to be unlawful" (A50).

Punitive damages, explained the Court, are awarded "in the discretion of the jury, to punish defendant for outrageous conduct and to deter her or others like her from performing similar conduct in the future" (A51). The jury should consider whether "the defendant may be adequately punished by an award of actual damages only, or whether the conduct is so extreme and outrageous that actual damages are inadequate to punish wrong conduct" (A51).

The jury was also instructed that they should "also consider whether actual damages standing alone are likely

to deter or prevent defendant again performing any wrongful acts she may have performed whether punitive damages are necessary to provide deterrence" (A52).

The District Court also explained that if the jury determined that it wanted to award punitive damages, "then we would have a very short summation by counsel based on the evidence that isn't before you, to allow you to make that determination, but you will not make that determination at this time" (A56).

(3)

The next day, the District Court indicated that it had not seen plaintiff's counsel's letter stating that he was "satisfied that punitive damages are not available against the City of New York on the *Monell* claim (Fourth Cause of Action) . . ." (A65, A10).

The District Court went on to state that in the instant case, "[p]unitive damages can be awarded on this *Monell* claim" (A65). The Court explained that the case at bar was not a matter where a city official denied a party her right to free speech. Instead, "[t]his was a case where the city's policy violates recognized law in this state" (511-512). Therefore, the Court was of the opinion that damages could be award on the basis of the strip search (A66).

The City's attorney again offered to show the Court plaintiff's letter indicating that he was "satisfied that punitive damages are not available against the City of New York on the *Monell* claim (Fourth Cause of Action) . . ., " Plaintiff's counsel, ignoring his letter, reversed course and stated to the Court: "I made a cursory review of the law last

night, and I'm sure your Honor's opinion interpretation is correct" (A66).

(4)

The jury returned the following verdict: As to whether plaintiff Ciraolo proved that defendant Morgillo had no probable cause to arrest to arrest her, the jury answered no (A69). As to whether defendant Morgillo used excessive force, the jury answered no (A69). As compensation for the strip search, the jury awarded plaintiff a $1,325 for medical expenses and $18,320 for pain and suffering for a total of $19,645 (A69). The jury found that defendant Morgillo had not subjected plaintiff to battery (A69). The jury did indicated in its verdict that it wished to assess punitive damages (A69).

The Punitive Damages Verdict

(1)

After the jury indicated that they wish to assess punitive damages, the Court explained why "I directed a verdict on the third cause of action" (A70). Punitive damages, explained the Court, would only lie because of the City's adoption of the policy found in exhibits 57 and 58 placed in evidence (A70, 71, 14, 16-21).[2] The Court

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[2] Exhibit 57 was a Department of Corrections, Interdepartment Memorandum, dated October 28, 1996, signed by Alonzo Davis, Executive Officer, stating that effectively immediately, all female police prisoners arriving at the facility would be stripped searched in pen 1 in the rear of the "female area" (A14).

Exhibit 58 was a New York City Correction Department Memorandum for the Manhattan Detention Complex/Court

stated that in 1986 the Second Circuit held that "that as reasonable suspicion that an accused misdemeanor or other minor offender is concealing weapons or other contraband - suspicion based on the particular traits of the offender, arrest or crime charged -is necessary before subjecting the arrestee to the indignities of a strip body cavity search" (A71-72).[3]

The Court stated that despite this decision, the City of New York, through its Department of Corrections "promulgated not just one but two memoranda," subjecting people to strip searches in all cases regardless of whether there is any suspicion or reason to suspect that they had concealed weapons or contraband on their body (A71). This decision, the Court added, is basically why it directed the verdict (A71). The Court then took a ten minute break (A71).

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division, effective date July 23, 1996, establishing "guidelines upon the acceptance of all Police Cases in the Manhattan Court Division" (A16). The Policy included the statement that "all police prisoners received shall be stripped search (sic) by the officer assigned to the search post" (A20).

[3] See, Weber v. Dell, 804 F. 2d 796, 802 (2d Cir. 1986) where the Second Circuit held that "the Fourth Amendment precludes prison officials from performing strip/body searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband."

(2)

During the break, the Court stated to counsel for the parties that "normally what we do have the financials of the defendant corporation or individual put into evidence, and then the people argue that they ought to have to pay this much because of their income or assets" (A72).

The attorney for the City responded that "I think that is part of the reason why punitive damages are not to be assessed" (A72). The Court in turn stated that it was not "going to address that" and the City could "take that up" on appeal (A73).

The Court indicated that at this point in the punitive damages trial procedure "financials" are presented so that the jury "have some financial parameters within which to gauge what the situation is" (A73). The Court acknowledged that it did not know how to handle the punitive charge with regard to the City indicating it may be "a case of first impression"(A73).

The City attorney stated that she interpreted the jury's question as asking for a "cap" (A73-74). The attorney indicated that while someone from the Comptroller's office might be called, she did not know who that person would be (A74).

The Court stated that they should just proceed to argument because the jury could be not kept "forever" (A74). The Court indicated the jury could fix an amount, and the City could appeal and the Circuit Court "if they slap down part of it, they slap it down" (A74). The City attorney objected to the procedure the Court was following (A74).

The jury returned a verdict answering yes to the first question and awarded plaintiff $5,000,000 in punitive damages (A80, 89).

THE COURT OF APPEALS OPINION

(1)

The Circuit Court in an opinion authored by Circuit Judge Calabresi held that they were constrained by this Court's holding in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) to reverse the award of punitive damages (App.13-14).[4]

The Circuit Court in reviewing *City of Newport* found that this Court had concluded that municipal immunity from punitive damages was well established at common law (App.7). This Circuit Court also noted that this Court found no legislative history to suggest that it was the intent of Congress to expose municipalities to such damages under § 1983 (App.7).

This Court stated that petitioner relies on footnote 29 in *City of Newport* for the claim that punitive damages are warranted in her case (App.8). Footnote 29, the Circuit stated, "suggests that, in the rare case where taxpayers *are* directly responsible for an outrageous violation of a plaintiff's constitutional rights, it may well be just for the taxpayers to bear the burden of punitive damages" (App.9). The Circuit Court concluded that while they deplored the City's conduct in adopting a policy that the Circuit had

[4] Numbers in parentheses preceded by the letters "App." refer to the page numbers of the appendices of petitioner's petition for a writ of certiorari.

earlier held unconstitutional, "the taxpayers themselves cannot be held responsible for the policy under the reasoning of *Newport*" (App. 12).

(2)

Circuit Judge Calabresi wrote a concurrence to his majority opinion (App.14-33). He stated that while the result reached by the Circuit Court was compelled by Supreme Court precedent, he respectfully suggested that the polices behind punitive damages and the purpose of §1983 would be better furthered by a different outcome (App. 14).

Judge Calabresi envisioned "socially compensatory damages" that were designed to make society whole by seeking to ensure that all the costs of harmful conduct are placed on the liable actor (App. 22). In order to achieve the goal of social compensation, as well as the goal of optimal deterrence, Judge Calabresi stated that it would be preferable if such damages were paid into a fund that could then be applied to remedy some of the unredressed social harm stemming from the defendant's conduct (App. 24-25). This would avoid the problem of a windfall to plaintiffs (App. 24).

(3)

Concurring in part, Circuit Judge Katzman stated that he concurred in the result reversing the award of punitive damages. However, he declined to express a view as to the meaning of footnote 29 in *City of Newport* beyond the context of the case at hand (App. 33). Finding that the Supreme Court provide little guidance as to what constitutes "an extreme situation where the taxpayers are

directly responsible for perpetrating an outrageous abuse of constitutional rights," Judge Katzman opined that he believed that here were many complexities associated with the idea to permit speculation with regard to a referendum situation not before the Circuit court (App. 33).

Judge Katzman found that the facts of the case did not bring the matter within the scope of footnote 29. "Accordingly, [he] declined to join [his] colleagues in speculating, even with non-binding effect on future courts, as to hypothetical circumstances under which taxpayers could be held directly responsible, whether in their role as voters or otherwise, including with respect to referenda" (App. 33-34).

REASONS FOR DENYING THE PETITION

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO MEET THE STANDARDS FOR REVIEW BY THIS COURT.

(1)

The first ground petitioner cites as the basis for this Court to grant certiorari is the existence of decisional conflicts among the circuit courts. It is true that the existence of conflicts between the decision to which review is sought and that rendered by this Court or another Circuit may provide the basis for granting certiorari. However, this means that there should be a real or "intolerable" conflict on the same matter of law and not merely an inconsistency in dicta or the general principles utilized. *See e.g., Insurance Corp. v. Compagnie, Des Bauxites*, 456 U.S. 694, 700 (1982); *United States v. Lorenzetti*, 467 U.S. 167

(1984). Those Circuit cases cited by petitioner as being in conflict with *City of Newport* do not meet this standard.

For example, in *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982), relied on by petitioner to demonstrate a conflict, police shot and killed the 17 year old plaintiff. The police claimed that the victim was armed. The jury disagreed and found that the City police had engaged in the practice of employing a "throw down," that is, the police took a weapon obtained from elsewhere and placed it next to the victim of a police shooting to justify their assault.

In its decision in considering the jury's award of punitive damages, the Circuit Court referred to the footnote in *City of Newport* wherein Justice Blackman articulated a possible basis for the assessment of punitive damages in a §1983 prosecution. In that footnote, Justice Blackman stated that

> It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights. Nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here. *City of Newport v. Fact Concerts, Inc., supra,* 453 U.S. p. 267 n29.

The Circuit Court also quoted Justice Blackman's point in *City of Newport* that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for services for the citizens footing the bill. Neither reason nor justice suggested that

such retribution should be visited upon the shoulders of blameless and unknowing taxpayers." *Id.*

The Circuit Court in *Webster* concluded that the plight of the plaintiff "however, reprehensible, however tragic, does not rise to the level of outrageous conduct to which Justice Blackman referred." *Webster v. City of Houston, supra*, 689 F.2d at p. 1229. Clearly, the majority in *Webster* followed to the letter the holding of *City of Newport.*

Similarly in *Heritage Homes of Attleboro, Inc. v. Seehonk Water District*, 670 F.2d 1 (1st Cir.1982), *cert den*, 457 U.S. 1120 (1982), the Circuit Court followed this Court's holding in *City of Newport.* In *Heritage Homes,* 80 to 85 residents of a water district attended a meeting at which blatantly racial discussions took place. Following the discussions, the residents voted 88 to 8 to exclude from the district a real estate development which was willing to sell homes to black people. The Circuit Court held that since there were approximately 13,5000 residents in the water district at the time of the vote, punitive damages should not be assessed against the district based on the actions of 88 individuals.

More specifically, the Circuit Court found that the facts did not fit into any exception found in *City of Newport. Id.* at p. 2. The Circuit Court held that

> Absent widespread knowledgeable participation by taxpayers, the analogy to municipal officials is apt: to award punitive damages against the Water District would not serve the purposes of punishment or deterrence. As [the Supreme Court]

> observed [in *City of Newport*], "blameless or unknowing" taxpayers would be punished by imposing punitive damages here. The actions of a small claque of voters would burden several thousand participants, many of whom are unaware of the entire controversy. *Id.*

Clearly, this holding fails to reflect any conflict between the First Circuit and the Fifth Circuit and this Court. Judge Goldberg's concurring opinion wherein he argues that his Court reached an erroneous opinion in *City of Newport* does not raise an "intolerable conflict" that provides the basis for this Court's review.

(2)

Judge Calabresi's concurrence in the instant case also fails to provide a basis to grant certiorari. Judge Calabresi's renamed punitive damages called "socially compensatory damages" rests on the unfortunate fiction that likens stockholders and corporations to taxpayers and municipalities. The fact is stockholders voluntarily invest in a corporation in the hope that the corporation will provide a financial benefit to them as stockholders. On the other hand, the taxpayer's obligation is not voluntary; rather it is an enforced contribution exacted pursuant to legislative authority, collected to be used for public or governmental purposes.

This essential difference was recognized by this Court in *City of Newport. City of Newport v. Fact Concerts, Inc., supra,* 453 U.S. pp. 262-263. This Court noted that municipal corporations are engaged in the performance of

acts for the public benefit. Judge Calabresi gives little heed to this significant difference. Not surprisingly then, he finds no sympathy for this Court's observation that "courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer has been chastised." *Id.* at p. 263.

Judge Calabresi's opinion is rooted in the speculative view that the municipal employee found in the far reaches of an agency, in this case the Department of Corrections, far from the centers of power will readily assess "the relative social costs and benefits of a particular municipal policy if he knows that it will bear all, rather than only some of the costs of that policy." Applied to facts at bar, it is Judge Calabresi's view that the Department of Corrections employees, educated in the fine points of search and seizure and the current state of constitutional law, will engage in a balancing test of relative social costs and benefits of strip searches. It is the lack of realism of this notion that lends so much support to this Court's finding that "it is far from clear that municipal officials, including those at the policy level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municpality." *Id.* at p. 268.

In sum, Judge Calabresi's concurrence fails to dislodge the "considerations of history and policy" relied on by this Court in holding that "absolute immunity from [punitive] damages obtained at common law and . . undisturbed by the 42nd Congress, and because that immunity is compatible with the purposes of § 1983 and general principles of public policy" support the finding that

a municpality is immune from punitive damages under 42 U.S.C. § 1983. *Id.* at p. 271.Therefore, this Court should not grant the petition for certiorari in the instant case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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